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In The
Supreme Court of the United States

NANCY ROBERTS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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September, 2006

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QUESTIONS PRESENTED FOR REVIEW

1. Do VA hospital employees act within the scope of their employment for purposes of Federal Tort Claims Act protection when they create "turmoil and hostility" in the VA's surgical services unit by telling lies about and circulating derogatory petitions against a co-worker?

2. Did the District Court abuse its discretion when it prohibited the Petitioner from taking the discovery deposition of one of the VA employees-tortfeasors and prevented the Petitioner from inquiring into the motives of two other tortfeasors and then subsequently making findings of fact regarding the scope of employment conduct in which the three tortfeasors personally engaged?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Nancy Roberts is an employee of the Veterans Administration at the VA's Mountain Home Medical Center and Hospital located at Johnson City, Tennessee and is a resident of the state of Tennessee.

Respondent

The United States of America is the current respondent. The federal government was substituted by the District Court as the defendant in the place of five individual employees of the VA's Mountain Home Medical Center and Hospital who had been sued as individual party defendants in the Petitioner's state court tort action.

Other Parties

Five individual VA employees were sued as party defendants in the Petitioner's original state court tort action. They were replaced as defendants by the United States pursuant to the certification of the U.S. Attorney and the order granting substitution entered by the Federal District Court for the Eastern District of Tennessee at Greeneville. The five state court defendants are Dr. Julie Dunn, Rachel Weston, Wanda Ibrahim, Lori Hagen, and Stephanie Story. They have

been represented in the proceedings below by the U.S. Attorney.

Petitioner Nancy Roberts respectfully requests that this Court issue a Writ of Certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 24

CONCLUSION 30

APPENDIX:

A. Sixth Circuit Opinion (06/28/06) ..... A1 - A15

B. District Court Opinion (08/12/04) ..... B1 - B10

C. District Court Order (08/12/04) ..... C1 - C1

D. District Court Opinion (06/06/03) ..... D1 - D7

E. District Court Order (02/25/03) ..... E1 - E5

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

United States v. Gaubert,
499 U.S. 315, 111 S.Ct. 1267,
113 L.Ed.2d 335 (1991) 26

TENNESSEE CASES

Bowers v. Potts,
617 S.W.2d 149 (Tenn. App. 1981),
cert. denied, Tenn. S.Ct, June 1, 1981) 26

Tennessee Farmers Mutual Insurance Co., et al. v. American Mutual Liability Insurance Co.,
840 S.W.2d 933 (Tenn. App. 1992) 26

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 4

28 U.S.C. § 1346(b) 1-4

28 U.S.C. § 2679(d) 4

28 U.S.C. § 2680 1-2

42 U.S.C. § 2000e-3 29

TREATISES

Restatement (Second) of Torts) § 228 26

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit on the merits, No. 04-6391, was issued on June 28, 2006 and is unreported. It is reproduced as Appendix A. [Sixth Circuit Opinion, Apx A1-A15]. The opinion and order of dismissal by the United States District Court for the Eastern District of Tennessee at Greeneville, No. 2-02-CV-381, were issued on August 12, 2004 and are unreported. They are reproduced in Appendices B & C. [Opinion, 08/12/04, Apx B1-B10; Order, 08/12/04, Apx C1].

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on June 28, 2006. This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petitioner's claims involve the "scope of employment" provisions of the Federal Tort Claims Act, codified at 28 U.S.C. § 1346(b) and the FTCA specified exclusions set out at 28 U.S.C. § 2680. The pertinent subsection of the Federal Tort Claims Act, with its employment "scope of employment" language is codified at 28 U.S.C. § 1346(b):

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together

with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the **negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,** under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. [Emphasis supplied].

The pertinent statutory exceptions to the waiver of governmental immunity which preclude a victim from pursuing any legal claim against the federal government under the Federal Tort Claims Act are set out at 28 U.S.C. § 2680:

§ 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to --

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to

exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

...

(h) **Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights**: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. [Emphasis supplied].

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit exercised jurisdiction over the Petitioner's appeal from the final Order of the District Court which dismissed her complaint and from the Order of the District Court which denied her FRCP #59(e) Motion to Alter or Amend the Judgment pursuant to the provisions of 28 U.S.C. §

1291. The Court of Appeals exercised *de novo* review of the decision of the District Court regarding the scope of employment determination under the provisions of the Federal Tort Claims Act and its dismissing the Petitioner's complaint. The Sixth Circuit reviewed the District Court's imposition of restrictions on the Petitioner's discovery rights under the "abuse of discretion" standard.

The District Court for the Eastern District of Tennessee at Greeneville exercised jurisdiction of the Petitioner's state court tort claims against the individual VA employees-tortfeasors pursuant to the provisions of 28 U.S.C. § 1346(b) after the United States Attorney filed a Notice of Removal with the Clerk of the Court in December 2002. Pursuant to 28 U.S.C. § 2679(d)(2), U.S. Attorney Harry S. Mattice, Jr. certified that the individual defendants sued in the Petitioner's state court complaint were acting within the scope of their employment when the tortious conduct described in complaint occurred and that the United States should be substituted as the party defendant. The District Court assumed jurisdiction of the removed complaint and substituted the United States as the party defendant pursuant to the provisions of 28 U.S.C. § 2679(d), 28 U.S.C. § 1441(b) and 28 U.S.C. § 1346(b)(1). The District Court's jurisdiction and authority to hear and decide the Petitioner's challenge to the U.S. Attorney's "scope of employment" certification has not been an issue in this case.

Mrs. Roberts petition seeks judicial relief from the *de novo* ruling of the Sixth Circuit Court of Appeals affirming the decision of the District Court and which held that the disruptive "turmoil a..d hostility" caused in the VA's surgical services area by the five VA employees-tortfeasors's deliberate lies and derogatory petitions were within the scope of each tortfeasor's employment. The superficial scope of employment analysis performed by the Court of Appeals assumed that Mrs. Roberts had been causing "turmoil and hostility" even though there was no contemporary evidence to support that assumption, other than the lies told by the tortfeasors. Though the five tortfeasors created the "turmoil and hostility," they told the VA administrators that it was all Mrs. Roberts' fault. The Court accepted the torfeasors' malicious lies at face value and concluded that since they said it was so - it must be so.

The Court failed to examine the circumstances which motivated the tortfeasors' crusade against Mrs. Roberts and committed error when it concluded that the tortfeasors' lies and derogatory petitions were actuated, at least in part, by a purpose to serve their VA employer. The Court did no explain how the tortfeasors' creating "turmoil and hostility" in the VA's surgical services area could possibly serve the businsess interests of the VA.

Because the District Court's opinions reflect a lack of awareness regarding which facts and circumstances should be relevant to the scope of employment certification proceedings, it abused its discretion by curtailing the

Petitioner's discovery rights and preventing her from obtaining information which would have been pertinent to a proper legal analysis.

Additionally, the concern expressed by the Court of Appeals' Opinion that its holding in the Petitioner's case conform with its prior interpretation of Ohio agency law indicates that the Court was attempting to develop a simplified federal "scope of employment" common law for scope-certification proceedings instead of applying the law of the state in which the individual tortfeasors committed their deliberately malicious activities - in this case Tennessee. [Sixth Circuit Opinion, Apx A10-A11]. The principal that federal courts apply the employment-agency law of the state in which the defendant federal employee committed the state law tort was recited by the Court of Appeals and is not at issue at issue in this case. The Court misconstrued and misapplied Tennessee law to the facts of the case.

The Petitioner's state court complaint included claims for relief ~~based on the~~ individual defendants' outrageous conduct, intentional infliction of emotional distress, tortious interference with her employment, tortious inducement to breach her employment contract with the VA, libel, professional disparagement, and tortious interference with her professional career. The facts which supported Mrs. Roberts' claims for relief were never briefed by the parties nor addressed by the District Court.

The District Court did not conduct a scope-certification hearing before it determined from the written record that Mrs. Roberts' presence caused the "unrest" in the VA's surgical services unit. [Opinion, 08/12/04, Apx B9].

The District Court also abused its discretion by curtailing the Petitioner's already limited discovery efforts to expose the tortfeasors' personally retaliatory motivations as those motives and purposes related to the "scope of employment" issues under Tennessee agency law. After the government had filed its motion to dismiss her complaint, the Petitioner moved the Court for permission to conduct discovery of the individual VA tortfeasor defendants on the "scope of employment" issue. After extensive briefing by the parties, District Judge Thomas Hull granted the Petitioner's motion for limited discovery. [Memorandum Opinion, 06/06/03, Apx D1-D7]. The District Court's opinion noted that whether the tortfeasors' conduct was motivated, or "actuated," by "a purpose to serve the master" was the issue which needed to be determined after the Petitioner was allowed to conduct her limited discovery. [Opinion, 06/06/03, Apx D6-D7].

None of the individual tortfeasors were in the Petitioner's chain of command at the VA. None of the tortfeasors had supervisory authority over the Petitioner.

The parties' attorneys arranged for the depositions of VA tortfeasor-employees CRNA Wanda Ibrahim and nurse Stephanie Story. The Petitioner's attorney attempted to inquire into Ibrahim's and Story's knowledge of, and

reaction to, Mrs. Robert's April 2001 EEO charges which had implicated their personal friend, Nurse Manger Lori Hagen, as a perpetrator of Title VII retaliation. The Assistant U.S. Attorney objected to that line of questioning and directed that the two ladies not respond. District Judge Ronnie Greer eventually denied the Petitioner's motion to compel discovery regarding the individual tortfeasor's knowledge of, and reaction to, her having filed EEO charges which named Lori Hagen as a retaliator. [Order, 02/25/04, Apx E1-E5]. The District Court's Order also prohibited the Petitioner from taking the discovery deposition of Dr. Julie Dunn, the part-time VA physician who had circulated her false and defamatory anti-Roberts petition among the VA surgeons and physicians. The discovery of tortfeasor Dunn's motivation and purposes for generating her anti-Roberts petition and for disparaging the Mrs. Roberts among her fellow physicians was critical because Dunn's tortious activities immediately convinced the VA administration to transfer the Mrs. Roberts out of her CRNA position in the surgical services area.

Mrs. Roberts needed to depose the individual defendants regarding their respective knowledge of, and reaction to, her having filed an EEO charge in order to marshal evidence of the tortfeasors' "purpose" or "motives" for generating their defamatory petitions, for inciting the VA surgical staff against her, and for blaming her for the "turmoil and hostility" which they had caused.

The Petitioner was severely handicapped at the outset of this case by the oppressive discovery limitations imposed by the District Court. The discovery restrictions constituted an abuse of discretion on the part of the District Court. The Sixth Circuit Court of Appeals affirmed the District Court's discovery limitations. The Sixth Circuit Court of Appeals then affirmed the dismissal of the Petitioner's complaint against the substituted defendant, the United States of America, on the grounds the Petitioner had failed to exhaust her Federal Tort Claims Act remedies. [Sixth Circuit Opinion, Apx A1-A15].

Petitioner Roberts' state law tort claims are premised upon the fact that the VA tortfeasors each personally and maliciously maligned and disparaged her in three scurrilous petitions which they circulated among the VA surgical unit staff because they were personally upset that Mrs. Roberts had filed Title VII EEO sexual harassment and retaliation charges which implicated their good friend Lori Hagen. At the time, Hagen was a personally popular Nurse Manger of the VA's Operating Room. The tortfeasors' anti-Roberts campaign incited many of the surgical services staff who had been working for years with Mrs. Roberts to turn against her.

Ms. Roberts had worked for the past 20 years at two different VA medical centers and hospitals as a Certified Registered Nurse Anesthetist (CRNA). She had an excellent professional work record. In January 2001, Mrs. Roberts had finally tired of the vulgar and sexually

demeaning remarks repeatedly directed at her by a recently hired male CRNA named Reuben Fuentes. Mrs. Roberts reported Fuentes' offensive remarks and gender harassment to Dr. Clarence Goulding, the VA's Chief of Anesthesia Section. Goulding told other VA supervisors, including his friend, Nurse Manger Lori Hagen, about Mrs. Roberts' complaints, and informed Hagen that those complaints had caused him to experience chest pains. Hagen, who supervised the nursing staff in the VA's surgical suite, took it upon herself to personally confront Mrs. Roberts on January 24, 2001, and verbally chastise her for complaining about Fuentes's sexist verbal abuse and for causing Dr. Goulding's chest pains.

Upset by Fuentes' repeated, vulgar, and insulting sexist remarks, by Dr. Goulding's inability or unwillingness to stop the verbal harassment, and by Hagen's retaliatory confrontation, the Petitioner agonized over whether to file an EEO charge. At the suggestion of the VA's EEO counselor to follow her chain of command, Mrs. Roberts complained directly to the VA's Director of Surgery, Dr. Theron T. Knight, Jr., about Goulding's unresponsiveness to her harassment complaints and about Hagen's retaliatory remarks. At a meeting attended by the Petitioner, Dr. Knight, his administrative assistant, and VA Labor Relations Specialist Patsy Fish, Dr. Knight assured the Petitioner that he would talk to Fuentes and to Nurse Manager Hagen.

Fuentes and Hagen behaved themselves for the remainder of the 45-day span of time allowed by federal EEO regulations for the Petitioner to "formalize" her initial harassment and retaliation complaint. But after that 45-day window had closed without Mrs. Roberts' having filed formal discrimination and retaliation EEO charges, Fuentes resumed his sexually offensive behavior.

On April 19, 2001, Lori Hagen followed the Petitioner down a hallway and accused her of being "mean, evil, and condescending." Hagen added that her staff thought the Petitioner was "crazy." The next day, CRNA Rachel Weston appeared to take obvious delight in showing Mrs. Roberts a note which Reuben Fuentes had told Weston to deliver to Mrs. Roberts. The note stated: "Fuck you, Moron." A conference which the Petitioner requested with supervisor Dr. Knight was canceled. Dismayed by the continuing retaliation and harassment and by her supervisors' indifference, Mrs. Roberts telephoned the VA's EEO counselor stationed in Washington state and initiated additional EEO discrimination and retaliation charges against the VA on April 23, 2001. While the EEO staff was investigating her new charges, the Petitioner continued to perform her CRNA duties in a satisfactory and uneventful fashion.

Without forewarning to Mrs. Roberts, the VA Chief of Staff Dr. Louis Cancellaro abruptly transferred her out of the anesthesiology unit and the surgical services area on the morning of June 27, 2001, and reassigned her to the

VA hospital's emergency room as a triage nurse. Obviously irritated, Dr. Cancellaro was abrupt with the Petitioner and told her he did not want to hear anything she had to say. Since then, Mrs. Roberts has been shuffled through other departments such as the VA's gastroenterology lab and bronchoscopy lab. Each reassignment was accompanied by, Cancellaro memo which restated the significance of the three anti-Roberts petitions which he and VA Director Dr. Carl Gerber had received from the tortfeasors in June 2001. The VA administration has never allowed the Petitioner to return to her regular CRNA duties in its surgical services area. Director Gerber announced during his deposition that Mrs. Roberts removal from the surgical services area would be "permanent."

The limited discovery allowed by the District Court on the "scope of employment" issues revealed that on the morning of June 11, 2001, EEO counselor Barbara Walter, who was stationed in Washington state, telephoned Lori Hagen at her nurse manager's office in the VA's surgical services unit. The EEO counselor told Hagen that Mrs. Roberts was going "formal" with an EEO charge which described Hagen as a perpetrator of retaliation against Mrs. Roberts. The counselor advised Hagen of the details of the Petitioner's allegations against her. Angry and incensed, Hagen stormed out of her office and announced to her nursing staff that Mrs. Roberts had just filed EEO charges against her and that she, Hagen, was resigning her position

as Nurse Manager of the OR because of Mrs. Roberts. Hagen told other VA employees that Mrs. Roberts' having filed an EEO charge against her "was the last straw" and had prompted her to resign her Nurse Manager's position.

In fact, Hagen had already interviewed for, and accepted, a position as the VA's Patient Safety Manager. Dr. Carl Gerber, the Director of the VA, testified during his deposition that Lori Hagen had resigned her position as Nurse Manager because of "lack of support" from the Chief of Surgery for any decisions she had wanted to implement in the surgical services department. Hagen admitted during her deposition that when she made her "announcement" about Mrs. Robert's EEO charges she knew her nursing staff would blame Mrs. Roberts for Hagen's resigning her position in the OR.

Hagen's blatant lie that Nancy Roberts' filing EEO charges against her had prompted Hagen to resign from the OR was malicious and was intended to inflame her friends at the VA against Mrs. Roberts. Hagen testified during her deposition that her nursing staff did not know that she had already made arrangements to leave the OR and become the VA's patient safety manager on the morning of June 11 when Hagen proclaimed her lie and blamed Mrs. Roberts. The other four tortfeasors immediately set about devising a way to turn the surgical services staff against Mrs. Roberts so that the VA would discharge her or remove her from the OR area.

Mrs. Roberts was unaware in June 2001 that Hagen's friends, Dr. Julie Dunn, CRNA Rachel Weston, CRNA Wanda Ibrahim, and nurse Stephanie Story had authored and circulated three derogatory petitions among the VA surgical staff which accused her of filing "untrue complaints" against Lori Hagen, of persecuting Hagen, and of creating a hostile work environment. In fact, it was the tortfeasors' anti-Roberts petitions and lies which created the unrest and hostility in the VA's surgical operating area which so concerned the VA and both lower courts. Though the District Court and the Court of Appeals concluded that "turmoil and hostility" existed in the surgical services area in June 2001, both courts erroneously blamed Mrs. Roberts for the disruption. [Sixth Circuit Opinion, Apx A1-A15; Opinion, 08/12/04, Apx B1-B10].

Had the tortfeasors attempted to pursue legitimate employment grievances through regular VA complaint channels, the Petitioner would have received notice of the substance of the charges or complaints against her and would have been given the opportunity to rebut them. But by deliberately avoiding the regular VA complaint channels, the tortfeasors were able to disparage and defame the Petitioner with impunity, create turmoil and disaffection in the OR, and never have to prove the truth of their accusations. They tortfeasors were clever and devious, and their conspiracy succeeded.

But prior to the tortfeasors' June 13-14, 2001 derogatory anti-Roberts petition drive, Mrs. Roberts had never been reprimanded or disciplined by her superiors for any alleged performance or behavioral problems. Prior to the vindictive anti-Roberts crusade, none of the VA surgeons had ever complained to the VA administration that Mrs. Roberts' presence in the OR was "disruptive" or "hostile."

One of the tortfeasors' anti-Roberts petition was displayed at the main surgical nursing station for the operating room nurses to review and sign. That petition was eventually signed by 25 staff members and forwarded to the VA's Medical Center Director, the Labor Relations Specialist, The Chief of Surgical Services, the Anesthesiology Chief, and the local union president. The nursing staff petition declared:

> To Whom It May Concern:
>
> It is with much regret that we feel compelled to write this letter. We feel that we have a moral and professional responsibility to put an end to this inappropriate and intimidating behavior of one of our co-workers.
>
> Her malicious behavior has been tolerated at a great expense to the surgery department at this VAMC.
>
> This person is Nancy Roberts, CRNA.

She has been on an active campaign to have Wanda Ibrahim and Lori Hagen replaced. You may ask, "Why this personal vendetta?" Because each of these leaders in our department have said "NO" to her. She will not tolerate anyone who is not in agreement with her behavior or her actions. She is the ultimate bully and maintains her reign of terror by intimidation.

How much longer should we, as her co-workers and peers, tolerate this type of behavior? Will this environment be allowed to continue until our patients suffer as a result" We ask that you provide us a stress free, non-hostile work environment by dealing with this individual.

Sincerely,

OR/Surgical Service

The affidavits of Dr. Arthur Dick, one of the surgeons who had refused to sign any of the derogatory petitions, explained that tortfeasor nurse Stephanie Story interrupted his operating room procedures during a surgery he was performing on June 13 2001. Nurse Story demanded that male scrub nurse Lloyd Kyte sign the anti-Roberts petition she was carrying. When nurse Kyte refused, Story accused him of "not having any balls." Story denied the entire episode during her limited discovery deposition. Dr.

Dick was surprised to later learn that the petition sought to "oust Nancy Roberts as a nurse anesthetist." Dr. Dick explained that from his perspective her professional performance had been "outstanding." Dr. Dick characterized the petition drive against Mrs. Roberts as a "witch-hunt."

The CRNA's petition/letter dated June 13, 2001, was generated by Rachel Weston and signed by the CRNAs who believed that Mrs. Roberts had forced Lori Hagen out of the OR. The CRNA petition stated:

> 6-13-01
> Ruben Fuentes C.R.N.A.
> Cathy Jo Hunt C.R.N.A.
> Wanda Ibrahim C.R.N.A.
> Rachel Weston C.R.N.A.
>
> Dr. Goulding, Dr. Knight, and Dr. Gerber
>
> In light of the recent events involving our department and the surgery staff, we feel we must speak out about our co-worker, Nancy Roberts C.R.N.A.
>
> We feel we are in a very hostile and stressful environment. Ms. Roberts has filed numerous complains which have no basis in reality and in fact are pure fiction (i.e. Lori Hagen stalks her, demands OR personnel address her as Major, etc-the list goes on and on).
>
> We, along with Lori Hagen, feel that we are not safe in our work environment. Ms. Roberts

> does retaliate, confabulate, and intimidate to obtain her goals (i.e. my husband will be seeing Dr. Gerber over my working late - I'll file a harassment charge, etc. again, the list goes on and on).
>
> Could someone please deal with this irrational behavior in the workplace? What becomes of the employees who are cooperative and professional? Are we without rights?
>
> We would prefer not to pursue this with a formal complaint regarding this consistently hostile workplace, however we fell threatened and endangered. This cannot help but effect patient care eventually.
>
> We will anxiously await your response.

The CRNA petition's phraseology that Mrs. Roberts' "numerous complaints which have no basis in reality" refers to the Petitioner's EEO charges. Paragraph two of the petition describes some of the details contained in the Petitioner's EEO charges which were discussed by the EEO investigator with tortfeasor Weston in early June and then with tortfeasor Hagen on June 11. The anti-Roberts petitions appeared in the OR area three days later after Hagen publicly and falsely blamed Mrs. Roberts for forcing her to resign her Nurse Manager's position in the OR.

CRNA Rachel Weston testified during her deposition that she had been telephoned by an EEO

investigator named Barbara Walter in early June and told that Mrs. Roberts had filed EEO charges against Lori Hagen. Weston included some of Mrs. Roberts' EEO details in the CRNA petition which she wrote on June 13, 2001. Weston admitted that she was referring to Hagen's having been forced out of the operating room by Nancy Roberts when she included the phrase "in light of the recent events" in her petition. Weston testified that although she had referred to "concerns about patient care" in her CRNA petition, she was not claiming at the time that patient care was being adversely impacted. Weston also admitted that she had not reported any patient care problems to the VA supervisors or administration before she wrote the petition.[1] Every CRNA who signed the Weston petition was "talking about" Mrs. Roberts' having forced Hagen to leave the OR.

VA Director Dr. Carl Gerber and Chief of Staff Dr. Louis Cancellaro both testified that Dr. Julie Dunn's anti-Roberts petition had the greatest impact upon the VA administrators. Signed by 12 VA surgeons, the Dunn petition stated:

June 14, 2001

To Whom It May Concern:

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[1] The Petitioner insists, and common sense dictates, that had any legitimate patient care problems actually arisen before the tortfeasors' petitions were circulated on June 13, 2001, those problems would have been reported to VA management. There were no such reports.

> It has come to our attention that a complaint has been filed against Ms. Lori Hagen, OR Nurse Supervisor. We are sending this letter in support of Ms. Hagen and feel the complaint is one of harassment. Ms. Hagen has been a nursing supervisor in our Department for several years. During that time, the efficiency of the Surgical Service has improved dramatically. Ms. Hagen is efficient, thorough, and perhaps most importantly, fair. In our collective experience (spanning more than 15 years), the Surgical Services have never been better managed.
>
> Because of this incident and others like it, Ms. Hagen has decided to leave our Service, much to our dismay and the dismay of those she supervises. We cannot idly stand by and watch the continual harassment that she and others have had to endure - much to the detriment of the Surgical Service.
>
> I urge you not only to investigate the complaint that has been filed, but to search the background of the individual filing this complaint for further insight into the REAL source of the problem.

After convincing 11 physicians to sign her petition in support of Lori Hagen, Dr. Dunn sent it to Director Gerber, the VA's Labor Relations Specialist, the Chief of Surgical Services, the Chief of Anesthesia Services and the local union president.

VA Director Gerber testified by deposition that after he read the Dunn petition he knew that the only "complaint" Mrs. Roberts had made against Lori Hagen was her EEO charge. The VA's EEO office had sent Director Gerber copies of all of the Petitioner's EEO paperwork. Chief of Staff Louis Cancellaro, who made the decision to remove Mrs. Roberts from the surgical services unit on June 27, 2001, explained during his deposition that he was especially concerned that VA physicians had signed a petition against Mrs. Roberts. Cancellaro testified that he learned about Mrs. Roberts' EEO activity sometime after he had transferred her to the VA's emergency room. According to Cancellaro's subsequent testimony before the Administrative Investigative Board, the tortfeasors' petitions had convinced him that Mrs. Roberts had been "persecuting" Lori Hagen. The individual tortfeasors' scurrilous attacks upon the Mrs. Roberts were so bitter and scurrilous that only her excellent professional and personal record as a CRNA saved her from being suspended and terminated.

The sworn testimony/affidavit of VA surgeon Dr. James Battle was preserved in the official Administrative Investigative Board record. Mrs. Roberts received a copy of the AIB record after she had filed her Title VII retaliation lawsuit against the VA. Dr. Battle's testimony revealed that the VA physicians who signed the Dunn anti-Roberts petition actually believed the tortfeasors' lies and thought that Mrs. Roberts' EEO charges had forced the

popular Lori Hagen to resign her position and leave the OR. The doctors were even under the impression that Mrs. Roberts had made a special trip to Washington D.C. in order to file her EEO complaint against Lori Hagen. Prior to eleven (11) of the VA surgeons being duped into signing the Dunn petition, no physician had filed any complaint of unprofessional conduct against Mrs. Roberts. Dr. Battle testified that he had never experienced or observed any professional or behavioral problems on the part of Mrs. Roberts.

The tortfeasors' vicious and unsupported accusations against Mrs. Roberts were unsubstantiated and could not justify the VA's transferring Mrs. Roberts to the emergency room. In an effort to support its exiling Mrs. Roberts, the VA administration conducted an in-house Fact-Finding Committee investigation during June and July 2001. The Petitioner was not advised of the charges against her and was not allowed to be present during the committee "interviews." Mrs. Roberts learned of the accusations each tortfeasor and other Hagen supporters made during the discovery phase of her lawsuit. But the Fact-Finding Committee failed to uncover any substantive facts, other than the tortfeasors' obvious personal dislike of Mrs. Roberts and their unsubstantiated gossip about her.

Two malicious and accusatory memos by Weston and Dunn were used by Chief of Staff Cancellaro to justify the VA's convening an Administrative Investigative Board

inquiry in March 2002. During this more formal "investigation," the tortfeasors and Hagen's supporters repeated and expanded upon their unsupported accusations against Mrs. Roberts. Lori Hagen gave the AIB typed notes which included malicious and untrue accusations that Mrs. Roberts was a disruptive and unwelcome influence in her church congregation and home neighborhood. These malicious accusations against the Petitioner's personal life and her cherished relationships had nothing whatsoever to do with anyone's employment activities at the VA. But Hagen and her friends were "scraping" the bottom of the barrel to find ammunition for their personal assault upon Mrs. Roberts.

The AIB report issued in May 2002 concluded that the surgical services staff was a "dysfunctional family," and that Mrs. Roberts was not the sole cause of the problems. The AIB noted that the "atmosphere had settled" after Mrs. Roberts' reassignment, that Mrs. Roberts was doing well in her new position (gastroenterology lab at the time). The AIB concluded that there was no real evidence that Mrs. Roberts' clinical performance was inadequate and no evidence to support the VA's revoking her CRNA privileges. The Board noted that Mrs. Roberts had never been reprimanded or counseled over any patient care issues.

The Administrative Investigative Board found that even though there was no evidence of any regulatory violations by Mrs. Roberts, the VA's returning her to the surgical services unit would "recreate" the dysfunctional

environment. The Board's report concluded that if the Human Resources Management Service could find a way to legally keep Ms. Roberts out of the surgery area, the AIB team would support it.

The tortfeasors' malicious attack upon Mrs. Roberts damaged her personally and professionally. It embarrassed and humiliated her and led to the loss of her CRNA on-call pay and privileges.

ARGUMENT

The two issues presented by this Petition are intertwined. The Court's restricting the Petitioner's scope-certification discovery rights was based on the errant assumption that the "trumoil and hostility" in the surgical services area predated the tortfeasors' anti-Roberts conspiracy. This misconception infected the Court's interpretation of the critical factors in Tennessee's scope of employment law. In the Petitioner's case, the District Court's significant restrictions prevented her from discovering and presenting relevant facts regarding the non-existence of the "turmoil and hostility" in the OR prior to Lori Hagen's announcing that Mrs. Roberts was the cause of her resigning her position. In making critical but incorrect assumptions from an inadequate factual record, the District Court and the Court of Appeals mistakenly concluded that the " turmoil and hostility" had pre-dated the tortfeasors' conspiracy, unfairly blamed the Petitioner

and dismissed her complaint. Both issues will be discussed in tandem.

The Court of Appeals ignored Tennessee agency law criteria which, when applied to the tortfeasors' conduct, shows that their successful efforts to stigmatize Mrs. Roberts were actuated by a personal purpose intended to create an atmosphere of anti-Roberts "turmoil and hostility" in the VA's surgical services area. That "turmoil and hostility" was, as matter of law, contrary to the business interests of the VA. While the Court concluded that there was "turmoil and disruption" in the VA's surgical unit, it assumed without any substantive evidence that the "turmoil and disruption" was caused by the Petitioner. Had the Court concluded correctly that the tortfeasors were responsible for the "turmoil and hostility" in the OR, it would have had to find as a matter of law that their conduct was outside the scope of their VA employment.

The Court of Appeals opinion reflects the Court's interest in conforming its opinion with its prior interpretation of Ohio agency law than with Tennessee agency law criteria. But Tennessee's agency law is more multi-faceted than Ohio's agency law and requires that the reviewing court make a determination of what is "in the interests" of the employer and what is a "contemplated" and "foreseeable" incident of the tortfeasors' employment. The employee's purpose, or motive, which actuated his/her

conduct is only the first part of the equation. [Sixth Circuit Opinion, Apx A10-A11].

The discretionary function exception to the Federal Tort Claims Act, which focuses only the "nature of the conduct" and is discussed in this Court's opinion in *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) is not a part of Tennessee's scope of employment law.

Two recent Tennessee cases have adopted the scope of employment criteria set out in the *Restatement (Second) of Agency § 228.* Both state appellate opinions make it clear that the motive, or purpose, of the employee-tortfeasor is a significant factor in a court's determining whether the employee's purpose was to serve the interests of his employer. The second and third significant factors are whether the employee's conduct "furthers the interests" of the employer and whether the conduct is a "contemplated incident" of the employment. See *Bowers v. Potts*, 617 S.W.2d 149 (Tenn. App. 1981), cert. denied, Tenn. Sup. Ct., June 1, 1981). *Tennessee Farmers Mutual Insurance Co., et al. v. American Mutual Liability Insurance Co.*, 840 S.W.2d 933, 937-939 (Tenn. App. 1992) added the test that whether or not the conduct of the tortfeasor came within the scope of his employment was whether the employer would have sent another employee to complete the task if the tortfeasor had failed in his assignment. Certainly the VA would not have assigned any

other physician or nurse the task of causing the "turmoil and hostility" in its surgical services area.

Mrs. Roberts' intentional tort case involves neither automobile accidents nor simple negligence. She believes that the Court of Appeals used a meat cleaver instead of a scalpel to analyze the salient facts in light of the different facets of Tennessee agency law. The "deliberateness" of the tortfeasors' actions and their intended consequences should have been considered by the Court of Appeals in its analysis of whether the tortfeasors' conduct was actuated by a purpose to serve the master. Tennessee recognizes that each "scope of employment" analysis is unique and involves a close examination which balances of all the facts and circumstances to which the state's agency/respondeat superior law has to apply.

The Court of Appeals made its decision upon an erroneous assumption that the "turmoil and hostility" in the OR had existed for months and that the tortfeasors' anti-Roberts petitions were intended to remedy the situation instead of cause it. In fact, the tortfeasors' conspiracy to ruin Mrs. Roberts was akin to a vendetta by high school age "mean girls" who do whatever they can to make their victim miserable.

In making its erroneous assumptions, the Court accepted the lies of the tortfeasors at face value. Meanwhile, the Petitioner was prevented from effectively cross-examining the tortfeasors during the limited

discovery process. The discovery restrictions prevented Mrs. Roberts from accessing critical facts which would show the Court the error of its presumptions.

Even so, the Petitioner insists that the limited factual record which the District Court allowed Mrs. Roberts to develop during the scope-certification proceedings established that the motives of the individual tortfeasors were personal and vindictive and that the tortfeasors created the "turmoil and hostility" in the OR to ostracize Mrs. Roberts. Their actions were directly contrary to the VA's business interest and were never contemplated or foreseen by the VA as being part of its employees' legitimate surgical services job activities. Unimpeded by additional facts which could have been discovered from tortfeasors Ibrahim, Story, and Dunn, the Court of Appeals acted on its preconceptions and applied Ohio's agency law instead of Tennessee agency law criteria in order to affirm the dismissal of the Petitioner's complaint.

Had the Petitioner been allowed to take the discovery deposition of Dr. Julie Dunn, she would have been able to procure salient facts regarding Dr. Dunn's motive for her authoring and circulating her anti-Roberts petition and Dunn's admission that there had been no "turmoil and hostility" among the VA's physicians before she began her June 2001 anti-Roberts' petition campaign.

There is no contemporary documented evidence of any "turmoil and hostility" among VA surgeons in the OR

area before the VA's EEO counselor telephone calls to Lori Hagen and Rachel Weston in early June 2001. There is no substantive evidence that Mrs. Roberts' EEO activities or work activities had disturbed the VA's physicians before those telephone calls. In apparent, though unintentional, disregard for the public policy considerations embedded in the anti-retaliation provisions of 42 U.S.C. § 2000e-3 of Title VII, the Court impliedly blamed the Petitioner for the "turmoil and hostility" which had been generated by the tortfeasors' campaign against her

The Court of Appeals' Opinion never directly addressed the tortfeasors' three derogatory petitions which caused all the "turmoil and hostility" in the VA's surgical services unit. The Court offered no analysis or explanation as to how or why it concluded that the lies in the three petitions had been motivated by an "intent to serve the interests" of the VA or how the resulting "turmoil and hostility" which the petitions incited could have "furthered the interests" of the VA or could be considered by any reasonable person as being "within the contemplation" of their employment at the VA. The Court missed the point of the tortfeasors' malicious anti-Roberts petitions and committed a miscarriage of justice.

The Court of Appeals should have reversed the District Court's dismissal of the Petitioner's complaint and directed the District Court to allow the Petitioner to fully depose Dr. Julie Dunn, CRNA Wanda Ibrahim, and nurse

Stephanie Story so it would have all the relevant facts regarding the real cause of the "turmoil and hostility" in the OR and thus render an informed decision regarding the validity of the U.S. Attorney's scope of employment certification.

Alternately, the District Court's judgment should have been reversed and the case remanded for proceedings on the merits of the Petitioner's claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT:

Opinion,
filed 06/22/05 ..... A1 - A15

EASTERN DISTRICT OF TENNESSEE:

Memorandum Opinion,
filed 08/12/04 ..... B1 - B10

Order,
filed 08/12/04 ..... C1 - C1

Memorandum Opinion,
filed 06/06/03 ..... D1 - D7

Order,
filed 02/25/03 ..... E1 - E5

No. 04-6391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NANCY ROBERTS,	)	
	)	ON APPEAL FROM
Plaintiff-Appellant,	)	THE UNITED STATES
	)	DISTRICT COURT
v.	)	FOR THE EASTERN
	)	DISTRICT OF
UNITED STATES	)	TENNESSEE
OF AMERICA,	)	
	)	OPINION
Defendant-Appellee.	)	

FILED
June 28, 2006
Leonard Green,
Clerk

BEFORE: SILER, CLAY, and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. Roberts is a Certified Registered Nurse Anesthetist who worked in the operating room of a Department of Veterans Affairs ("VA") hospital in Tennessee. She sued five of her federal co-workers in state court, alleging various state tort claims against them. The Government removed the action to federal court. Over Roberts's challenge, the district court substituted the Government as the party defendant because it found that

the individual defendants[1] were acting within the scope of their employment and were therefore immune from suit under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 (the "Westfall Act"). On the Government's motion, the district court then dismissed the suit for lack of subject-matter jurisdiction because Roberts did not exhaust her administrative remedies.

On appeal, Roberts argues that the individual defendants acted with personal malice and not with an intent "to serve the master." Thus, she maintains, they acted outside the scope of their employment and the Government should not have been substituted as the party defendant. We disagree, and affirm judgment in favor of the Government for the reasons provided below.

I.

In 2001, Roberts initiated an EEO action for discrimination and retaliation against the VA based, in part, on several comments purportedly made by Lori Hagen, a nurse supervisor in the hospital's operating room. After

[1] For convenience, we refer to the five co-workers originally sued in state court as the "individual defendants."

being informed of the EEO charge and Roberts's allegations, Hagen immediately informed her staff that the charge was the "last straw" and that she was resigning her position in the operating room as a result. There is evidence in the record, however, that Hagen bad decided several days earlier to accept a transfer to another position.

Shortly after Hagen made her statement, the other individual defendants drafted and circulated three different petitions. The petitions stated that the signatories supported Hagen, accused Roberts of creating a stressful, hostile work environment in the operating room, and suggested that patient care would eventually degrade as a result of Roberts's behavior. Memoranda alleging problems caused by Roberts were also submitted to a fact-finding board.

Hagen did not sign or circulate any of the petitions, or submit memoranda to the fact-finding board. In Roberts's view, however, it was Hagen's statement - her "big lie" - that instigated her coworkers' actions.

Roberts was removed from the operating room's anesthesia unit. She subsequently worked in the emergency room as a triage nurse and the gastroenterology department assisting with colonoscopies. She has not returned to work in the anesthesia unit.

II.

In November 2002, Roberts sued the individual defendants, alleging state tort claims of outrageous or egregious conduct, intentional infliction of emotional distress, tortious interference with her employment relationship, tortious inducement to breach her employment contract, libel, professional disparagement, and interference with her professional career. Upon removing the lawsuit to federal court, the Government certified that the employees were acting within the scope of their employment when they purportedly committed the tortious acts. Based on the Government's certification, the district court substituted it as party defendant. The Government then moved to dismiss the suit for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because Roberts failed to exhaust her administrative remedies prior to filing suit.

Roberts challenged the certification, arguing that the individual defendants were acting solely out of personal malice. The court permitted Roberts to engage in limited discovery on the scope-of employment issue. Upon close of discovery, the district court concluded that the individual defendants were acting within the scope of their employment, as defined by Tennessee law. Because there

was no dispute that Roberts had not exhausted her administrative remedies, the district court dismissed the case without prejudice.

III.

A. The Westfall Act

The primary issue on appeal is whether the individual defendants were acting within the scope of their employment under Tennessee law. The Westfall Act immunizes federal employees from liability for torts they commit when acting within the scope of their federal employment, 28 U.S.C. § 2679(b)(1). When a federal employee acts within the scope of her employment and commits a tort, any relief for that tort must be sought against the Government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (the "FTCA"). The obverse, of course, is that the Westfall Act does not immunize federal employees for torts they commit outside the scope of their federal employment; liability for such torts can lie with the individual tortfeasors under state law. Whether a federal employee acts within the scope of her employment is determined by applying the law of the state in which the

alleged tort took place, here Tennessee. *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir. 2002).

In response to the filing of a lawsuit in state court alleging tort claims against a federal employee, the Government can certify that the employee acted within the scope of his employment and remove the action to federal court. 28 U.S.C. § 2679(d)(2). The Government can then move to substitute itself as defendant in place of the targeted federal employee. *Id.* While the Government's certification is conclusive for the purpose of removal, *id.*, it is subject to challenge for the purpose of substitution, *Singleton*, 277 F.3d at 870. Thus, a plaintiff can challenge the Government's scope-of-employment certification in an effort to have the federal employee reinstated as a party defendant. If successful, the court must reinstate the federal employee as defendant and assess the claims under state tort law. *Id.* at 870 n.5. If unsuccessful, the Government remains the defendant and the case proceeds under the FTCA. *Id*; 28 U.S.C. § 2679(d)(1).

A plaintiff challenging the Government's certification has the burden of proof:

> We have held that "The Attorney General's certification provides *prima facie* evidence that the employee was acting within the

> scope of employment." *RMI* [*Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996).] Thus, to contest the propriety of substitution, the plaintiff must produce evidence that demonstrates that the employee was not acting in the scope of employment. If the plaintiff produces such evidence, the government must then produce evidentiary support for its certification.

Singleton, 277 F.3d at 870-71.

B. Standard of Review

In general, we review *de novo* a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 492 (6th Cir. 1999). "Whether an employee was acting within the scope of his employment is a question of law, not fact..." *Singleton*, 277 F.3d at 870 (quoting *RMI*, 78 F.3d at 1143). The district court, however, must resolve any factual questions "necessary to its decision before entering its order." *Id.* (quoting *Arthur v. United States*, 45 F.3d 292, 296 (9th Cir. 1995)). We review the court's factual findings for clear error, *Dixon v. Ashcroft*, 392 F.3d 212, 216-17 (6th Cir. 2004), and its application of the law to those factual findings *de novo*, *Singleton*, 277 F.3d at 870.

C. Scope of Employment Under Tennessee Law

Under Tennessee law, an employee acts within the scope of his employment if the employee's conduct meets the test set forth in the Restatement (Second) of Agency § 228 (1957):

> (1) Conduct of a servant is within the scope of employment if but only if:
>
> > (a) it is of the kind he is employed to perform;
> >
> > (b) it occurs substantially within the authorized time and space limits;
> >
> > (c) it is actuated, at least in part, by a purpose to serve the master; and
> >
> > (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master. *Tenn. Farmers Mut. Ins. Co. v. Am. Muz. Liab. Ins. Co.*, 840 S.W.2d 933, 938 (Tenn. Ct. App. 1992).

Roberts argues on appeal that the district court erred by not examining closely the motives of the individual defendants in determining whether their actions were "actuated, at least in part, by a purpose to serve the master." She maintains that they maligned and disparaged her, and that their personal motivations took their actions outside the scope of their employment under Tennessee law. Had she been permitted additional discovery, she believes that her evidence of personal bias and motivation would have been even stronger.

The district court properly focused on the individual defendants' actions and the circumstances of those actions. While evidence of intent can be relevant to whether an employee's actions were "actuated ... by a purpose to serve the master,"[2] Tennessee law generally measures the scope of employment not by "the motive of the servant, but whether that which he did was something his employment contemplated, and something which if he should do it lawfully he might do in his employer's name." *Hall*

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[2] Moreover, § 235 of the Restatement (Second) of Agency provides that "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incidental to a service on account of which he is employed."

Grocery Co. v. Wall, 13 Tenn. App. 203, 208 (1930) (quoting *Deihl & Lord v. Ottenville*, 82 Tenn. 191 (1884)). It is clear that under federal case law, an employee may engage in conduct that is not condoned by the employer – even in violation of the employer's policies – and still be within the scope of his or her employment. *See Arbour v. Jenkins*, 903 F.2d 416, 422 (6th Cir. 1990). Under Tennessee law, an employee can act within the scope of his employment even when committing wanton or willful torts against another:

> The rule recognized in all the recent cases ... is that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them.

Anderson v. Covert, 245 S.W.2d 770, 771-72 (Tenn. 1952) (quoting *Mott v. Consumers' Ice Co.*, 73 N.Y. 543, 547 (1878). *See also Johnson v. Chapman*, 327 F. Supp. 2d 895, 899 (E.D. Tenn. 2004) ("Plaintiff's allegations that [the

individual defendant] acted with vindictiveness and malice are not enough to overcome substitution where, even if true, [the employee's] actions appear to have been taken within her authority as a federal employee during the course of her employment."). This is consistent with the standards of several other states in our circuit. *See, e.g.*, *RMI*, 78 F.3d at 1143-44 (finding that, under Ohio law, the "bad or personal motive" of the alleged wrongdoer is of little import on whether the employee was acting within the scope of employment); *Woods v. McGuire*, 954 F.2d 388, 390 (6th Cir. 1992) ("Under Ohio law, employees, even though acting intentionally and maliciously, are within the scope of employment if acting in the course of employment and within their authority."); *Arbour*, 903 F.2d at 422 (explaining that, under Michigan law, "an employee's actions may be within the scope of his or her employment even if the actions constitute intentional torts").

Roberts tries to distinguish this line of cases by arguing that while *supervisors* might act within the scope of their employment even when they malign, harass, or otherwise mistreat the employees they supervise, *nonsupervisory* co-workers act outside their scope when they engage in similar behavior. She cites no case law to

support this distinction. As the Government points out, there is nothing in the Westfall Act that limits immunity to supervisors. In fact, we have previously found a federal employee immune from a co-worker's state tort action for, among other things, intentional infliction of emotion distress. *Woods*, 954 F.2d at 389-91 (affirming immunity under Ohio law of non-supervisor medical officer who purportedly made false allegations against the plaintiff).

Thus, in determining whether the individual defendants were acting within their scope of employment, we look to whether their actions were "actuated, at least in part, by a purpose to serve the master." Without question, Roberts's presence in the surgical unit generated turmoil and hostility, regardless of who was at fault. While patient care might not have suffered yet, such a result would be expected at some point in the future if the situation had not been resolved in some manner. Roberts acknowledges that the turmoil and hostile environment were not in furtherance of the VA's interests. It is apparent that the individual defendants were acting within the scope of their employment when they sought to have her removed from the unit.

As for Hagen's initial statement, she made it immediately after talking with a counselor about Roberts's

intention to file an EEO charge. She made it at work, to her co-workers. The substance of her comment involved her work - i.e., her transfer to another position within the VA. Thus, the comment was reasonably incidental to her employment. *See Tenn. Farmers*, 840 S.W.2d at 938 ("To be within the scope of employment, conduct must be ... incidental to the conduct authorized." (quoting Restatement (Second) of Agency § 229)).

Accordingly, even if Roberts's allegations of personal bias and malice are true, they are not sufficient to counter the evidence provided by the individual defendants that their actions were "actuated, *at least in part*, by a purpose to serve" the VA hospital. As the individual defendants were acting within the scope of their employment, the Westfall Act requires that the Government be substituted as defendant, and Roberts's only recourse for her tort claims is under the FTCA.[3]

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[3] Roberts claims that the district court erred when it permitted only limited discovery. Upon review of the record, we find no error. The court allowed Roberts to engage in discovery on the pertinent issue, including taking the depositions of four of the five individual defendants. The court's discovery order was well within its discretion. *See Woods*, 954 F.2d at 391 (finding no abuse of discretion where the plaintiff had an opportunity to depose two of the

There is no question that Roberts did not exhaust her administrative remedies as required, by the FTCA, 28 D.S.C. § 2675(a). Therefore, the district court properly dismissed her lawsuit without prejudice for lack of subject-matter jurisdiction under Fed. R Civ. P. 12(b)(1). *Singleton*, 277 F.3d at 872-73.[4]

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six defendants and had sufficient time to engage in other discovery); *see also Schrob v. Catterson*, 967 F.2d 929, 936 (3d Cir. 1992) (explaining that any discovery permitted should be "circumscribed as narrowly as possible" when a scope-of-employment certificate is challenged).

[4] Although not specifically raised by the Government, we note the following: The FTCA generally waives the Government's sovereign immunity for state tort actions. 28 U.S.C. § 2674. It has not, however, waived its sovereign immunity to several classes of torts, including libel, slander, misrepresentation, deceit, and interference with contract rights. *Id.* § 2680(h). This exemption in the FTCA, when read next to the Westfall Act's substitution provision, creates an apparent inequity: if the individual tortfeasor acted within the scope of employment when committing one of the exempted torts, then the Government must still be substituted and the individual tortfeasor remains immune from liability. *Maron v. United States*, 126 F.3d 317, 321-22 (4th Cir. 1997). The apparent unfairness of this result was noted by the Supreme Court a number of years ago: "...Congress recognized that the required substitution of the United States as the defendant in tort suits against Government employees would

IV.

For the reasons stated above, we AFFIRM the district court's judgment of dismissal.

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sometimes foreclose a tort plaintiff's recovery altogether." *United States v. Smith*, 499 U.S. 160,166 (1991).

Roberts states on appeal that "[i]t appears that *all* of [her] state law intentional tort claims derive from or akin to" the exempted torts. Appellant's Brief at 53 (emphasis added); *see also id.* at 52. Thus, given this admission, it follows that even if she were somehow to exhaust her administrative remedies, she would likely be unable to recover damages from the Government. Because the Government did not, however, move to dismiss her lawsuit for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the issue of whether her lawsuit should have been dismissed with prejudice is not before us.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

NANCY ROBERTS	)	
	)	
v.	)	**No. 2:202-CV-381**
	)	
UNITED STATES OF AMERICA	)	

FILED
Aug. 12, 2004
Eastern District of Tennessee, Clerk

MEMORANDUM OPINION

The plaintiff's complaint is before the Court on the motion of the United States to dismiss. [Doc. 5]. This action was removed from the Law Court for Washington County at Johnson City, Tennessee, by the United States which substituted itself for the original individual defendants, Julie Dunn, Lori Hagen, Wanda Ibrahim, Stephanie Story and Rachel Weston, alleging theories of outrageous conduct, intentional infliction of emotional distress, tortious interference with employment, tortious inducement to breach an employment contract, libel, professional disparagement and interference with her professional career.

The government's certification pursuant to 28 U.S.C. § 2679(d)(2)(Westfall Act) provides *prima facie*

evidence that the defendant employees were acting within the scope of their employment. If the government is appropriately substituted for the individual defendants, the plaintiff's action must be dismissed under the Federal Tort Claims Act, which requires the exhaustion of administrative remedies prior to filing suit. 28 U.S.C. § 2675(a).

The plaintiff has challenged the government's certification that the individual defendants were acting within the scope and course of their employment with the Veterans Administration, alleging that the individual defendants were acting solely out of personal malice. The plaintiff seeks to have the original defendants reinstated, and the case remanded to state court.

Whether an employee was acting within the scope of his or her employment is question of law, not fact, decided in accordance with the law of the state in which the conduct occurred. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996). Under Tennessee law, an employee acts within the scope of his employment if the employee's conduct meets the test set forth in the Restatement (Second) of Agency § 228 (1957). *Tennessee*

Farmers Mut. Ins. Co. v. American Mut. Liab. Ins. Co., 840 S.W.2d 933, 938 (Tenn. Ct. App.1922). That test provides:

> (1) Conduct of the servant is within the scope of employment if:, but only if:
>
> (A) It is of the kind he is employed to perform;
>
> (B) It occurs substantially within the authorized time and space limits;
>
> (C) It is actuated, at least in part, by a purpose to serve the master; and
>
> (D) If force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master. *Id.*

As the plaintiff does not allege that any force was used by the individual defendants against her, the Court's

analysis is limited to the first three factors set forth in the Restatement. On June 6, 2003, Senior United States District Judge Thomas G. Hull, to whom this case was originally assigned, entered a memorandum opinion in which he found that the first two elements set forth by the Restatement were met and permitted the plaintiff to conduct discovery on the issue of whether the individual defendants' conduct was "actuated, at least in part, by a purpose to serve the master." The Court concurs in Judge Hull's opinion, and **FINDS** that the defendants' conduct was both of the kind that they were employed to perform and occurred substantially within the authorized time and space limits.

The plaintiff indicates that the actions complained of were likely brought about by her informal and later formal EEO charges of gender discrimination which the plaintiff had filed. The original defendants, she claims, chose to act outside regular administrative channels and circulated letters/petitions, apparently to have the plaintiff removed from the anesthesia department. The conduct of which the plaintiff complains centers around three (3) documents. The first is an undated "to whom it may concern" letter, indicating its source as the "OR/Surgical

Service," and bearing 26 signatures. This document accuses the plaintiff of "inappropriate and intimidating behavior." The memo indicates that the plaintiff's behavior has created a stressful hostile work environment, in that the plaintiff had been on an active campaign and personal vendetta to have Wanda Ibrahim and Lori Hagen (two of the original defendants) replaced.

The second document is a letter of June 13, 2001, addressed to Drs. Golding, Knight and Gerber, from Ruben Fuentes, Kathy Jo Hunt, Wanda Ibrahim, and Rachel Weston (Ibrahim and Weston being two of the original defendants). The writers of this document claim they have been subjected to a hostile and stressful environment by Ms. Roberts, and request that the doctors deal with Ms. Roberts' behavior. The authors of the letter indicate that they do not wish to pursue a formal complaint, but indicate that patient care will eventually be affected as a result of Ms. Roberts' behavior.

The third document, dated June 14, 2001, is another "to whom it may concern" letter signed by twelve persons. This letter indicates that it has come to the authors' attention that Ms. Roberts has filed a complaint against Lori Hagen (another of the original defendants), the OR

nurse supervisor. The letter indicates that it is the writers' belief that the complaint lodged against Ms. Hagen is harassment, praises Ms. Hagen's management of surgical services, and indicates regret that she has determined to leave her position as OR nurse supervisor.

Of the originally named defendants, the plaintiff only points to evidence that Wanda Ibrahim, Stephanie Story, Rachel Weston, and Julie Dunn took any active role in. the creation and circulation of the letter/petitions which form the basis of the plaintiffs complaint. The plaintiff attempts to draw Lori Hagen into the creation and circulation of these memos, not by showing that she was the mastermind behind them, or that she induced others to create the memos, but by claiming that Lori Hagen perpetuated a lie which served as the incentive for the creation of the documents.

The plaintiff alleges that the "lie" that Ms. Hagen reportedly perpetuated began after she was contacted by Equal Employment Opportunity Counselor Barbara Walters on the morning of June 11, 2001. Plaintiff alleges that following this telephone conversation, Ms. Hagen "marched out of her office and told everyone around the OR office that Ms. Roberts had filed EEO charges against

her, and that the charges were the last straw, and that she would, therefore, resign her position as the nurse supervisor in the OR." The plaintiff alleges that, in reality, Ms. Hagen had already determined to resign her position, and had accepted other employment, prior to her conversation with the EEO counselor. The plaintiff submits that Hagen's announcement was therefore the "big lie," which served as the reason for the other additional defendants to circulate the letter/petitions. However, the facts set forth by the plaintiff are disputed to some extent, and are, at the least, subject to an interpretation much different than that proposed by the plaintiff. A district court's review of a certification question under the Westfall Act must resolve any disputed issues of fact necessary to its decision. *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir. 2002).

Certainly, the testimony of Lori Hagen supports the plaintiff's allegations that she did mislead the other employees to some extent. In her deposition, she indicates that on the morning of her conversation with the EEO counselor she told other employees that she had received a call about a complaint having been filed, and referred to it as the "last straw." Ms. Hagen admits that, a few days prior

to receiving this can from the EEO she had determined to accept the new position of Patient Safety Manager, though she did remain in her nurse manager position, serving in dual roles until September of 2001 when a replacement for her could be located. While Ms. Hagen had certainly accepted another position prior to receiving the call from the EEO counselor, she goes on to indicate in her deposition that "I would have stayed working in the operating room if it hadn't been for Ms. Roberts," and that she had applied for the Patient Safety Manager position because of the pattern of harassment she received from Ms. Roberts.

While Ms. Hagen's statements to her co-workers about the EEO complaint being the "last straw," may have misled her co-employees to believe that she would not have changed positions but for the EEO complaint, the fact remains that turmoil existed in the operating room environment so long as Ms. Roberts worked there, and, as recognized by the Administrative Investigation Committee which investigated the plaintiff's allegations, "when Ms. Roberts was reassigned, the atmosphere reportedly settled and everyone began working as a team, including to a

degree Ms. Harris, Ms. Roberts' only friend and supporter that we interviewed."

Under Tennessee Law, as set forth in the Restatement of agency, so long as the employees' purpose "is actuated, **at least in part**, by a purpose to serve the master," the employees have acted within the scope of their employment, even though the employee's actions may have also advanced their own interests. *See Bowers v. Potts*, 617 S.W. 2d 149 (Tenn. Ct. App. 1981). (emphasis added).

It is undisputed that unrest existed among the employees, which was resolved after Roberts' reassignment to another department. Clearly, the employees' actions, even if taken primarily out of some malice toward the plaintiff, also served the master, since their stated intention in the letter/petitions circulated was to address the hostile atmosphere and serve to insure that patient care did not suffer from the hostile atmosphere. Further, while these defendants utilized informal methods to lodge their complaints about Ms. Roberts, rather than the administrative scheme established for Veterans Administration employees, it should be expected that employees will often address problems with co-worker relationships to their superiors through means other than

the formal channels set up by the employer. *See Coleman v. United States*, 91 F.3d 820, 824-825 (6th Cir. 1996).

Accordingly, the Court **FINDS** that the conduct of these employees was reasonably incidental to their employment with the Veterans Administration, and that they were, therefore, acting within the course and scope of their employment. It follows, therefore, that; the plaintiff's challenge to the government's certification pursuant to the Westfall Act having failed, the plaintiffs complaint should be **DISMISSED** for failure to exhaust her administrative remedies by filing a claim with the appropriate federal agency. 28 U.S.C. § 2675(a).

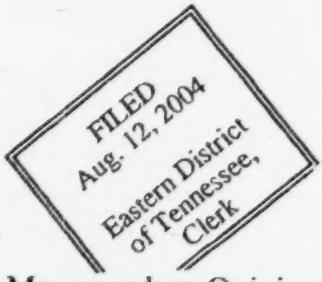
An appropriate order shall enter.

ENTER:

/s/ J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

NANCY ROBERTS	)	
	)	
v.	)	**No. 2:202-CV-381**
	)	
UNITED STATES OF AMERICA	)	



ORDER

For the reasons setout in the Memorandum Opinion that accompanies this Order, it is hereby **ORDERED** that the defendant's motion to dismiss the plaintiff's complaint is **GRANTED**. [Doc. 5].

ENTER:

/s/ J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENVILLE

NANCY ROBERTS	)	
	)	
v.	)	**NO. 2:02-CV-381**
	)	
UNITED STATES OF AMERICA	)	

FILED
June 6, 2003
Eastern District
of Tennessee,
Clerk

MEMORANDUM OPINION

The United States removed this tort action from the Law Court for Washington County at Johnson City and substituted itself for the original individual defendants. Plaintiff Nancy Roberts, a certified registered nurse anesthetist at the Veteran's Administration James H. Quillen Medical Center, had sued co-workers Julie Dunn, Lori Hagen, Wanda Ibrahim, Stephanie Story and Rachel Weston on theories of outrageous conduct, intentional infliction of emotional distress, tortious interference with her employment, tortious inducement to breach of her employment contract libel, and professional disparagement and interference with her professional career. Ms. Roberts alleged that these individual defendants had been acting out of personal malice, outside the scope and course of their

employment, and not in furtherance of their duties with the medical center.

However, in substituting itself for the individual defendants, the United States filed certifications that each of the defendants had been acting *within* the course of her employment. These certifications are *prima facie* evidence that the actions of the individual defendants occurred within the scope of their employment. Plaintiff Roberts has challenged these certifications and moved for leave to conduct discovery on the scope of employment issue and for a remand to state court. [Doc. 6].

If the Court sets aside the government's substitution, the individual defendants will be reinstated as parties and this action will likely be remanded to state court for further proceedings on the plaintiff's state law claims. On the other hand, if the Court does not set aside the substitution, and finds that the individuals originally sued were acting within the scope of their employment, then it will grant the government's motion to dismiss based on the plaintiff's failure to exhaust administrative remedies requisite to a claim under the Federal Tort Claims Act. [Doc. 5]. In other words, unless the Court finds that the originally sued Individuals were acting *outside* the scope of

their employment, Ms. Roberts will have no legal remedy for the wrongs she claims to have suffered.

In order to be permitted discovery on the scope of employment issue, Ms, Roberts has now offered evidence in the form of her own affidavit, a statement from original defendant Stephanie Story, an affidavit of Dr. Arthur L. Dick, and copies of letters/petitions generated by the original, individual defendants and circulated behind Ms. Roberts' back. Her evidence indicates that the actions complained of in this lawsuit were triggered by informal and later formal EEO charges of gender discrimination which plaintiff Roberts filed. The original defendants, apparently feeling threatened and endangered by her complaints, chose to act outside the regular administrative channels for addressing employee problems and circulated letters/petitions generated during working hours with the apparent intention of having the plaintiff removed from the anesthesia department. Defendant Stephanie Story even interrupted a surgical procedure in an attempt to obtain the signatures of operating room staff on one of the petitions.

The Court has carefully examined the three documents in question. One is an undated "to whom it may concern" letter, apparently from the "OR/Surgical Service" with copies to the Medical Center Director, the Labor

Relations Specialist, the Chief of Surgical Service, the Chief of Anesthesia Section, etc. It bears 26 signatures, mostly from nurses. The letter accuses plaintiff Roberts of "inappropriate and intimidating behavior." It charges that she has been on an active campaign and personal vendetta to have Wanda Ibrahim and Lori Hagen (two of the original defendants) replaced because these women have dared to say "no" to her. The letter describes Ms, Roberts as "the ultimate bully" who maintains her reign of terror by intimidation.

The second document is a letter of June 13, 2001, from Ruben Fuentes, C.R.N.A. (apparently the person Ms. Roberts had accused of gender discrimination); Cathy Jo Hunt, C.R.N.A.; Wanda Ibrahim, C.R.N.A. and Rachel Weston, C.R.N.A. (another of the original, individual defendants). It is addressed to Drs. Goulding, Knight and Gerber. The writers claim to feel that they are in a very hostile and stressful environment caused by the numerous, unfounded and irrational complaints which Ms. Roberts had been filing and their fear of retaliation from her. The writers claim to prefer not to pursue this matter with a formal complaint but they feel threatened and endangered and say "this cannot help but effect [sic] patient care eventually."

The third document is a June 14, 2001, "to whom it may concern" letter in the same typeface as the first such letter and apparently copied to the same list of recipients. It has twelve signatures. This letter indicates that it has come to the writers' attention that a complaint had been filed against Lori Hagen (another of the original defendants), OR Nurse Supervisor, which they consider to be harassment of her. The letter is written on Ms. Hagen's behalf. It praises her management of surgical services and regrets that she is leaving the department. It does not mention Ms. Roberts by name but urges the letter's recipients to investigate the complaint that has been filed and to search the background. of the individual tiling the compliant "for further insight into the REAL source of the problem."

Were the original defendants acting within the scope of their employment? Pursuant to the Restatement (Second) of Agency § 228, conduct of a servant is within the scope of employment if, but only if: (a) it is of a kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the

authorized time and space limits, or too little actuated by a purpose to service the master.

Writing such letters was not the work the defendants were employed to perform but, in the Court's judgment, raising workplace grievance – at least when raising them through the normal channels – would be work-related. The letters/petitions do not raise any patient care complaints and do not appear to be related to the performance of Ms. Roberts' duties as an anesthesiologist. However, the letters do not mention anything about Ms. Roberts' personal life or anything occurring *outside* the work environment. The letters all address workplace concerns and the atmosphere that had been created by Ms. Roberts' several EEO charges. One letter even suggests that patient care will eventually be affected if the workplace tension is not eased. Arguably the writing of the letters passes the first of the criteria. They were also generated within the time and space limits of the hospital workday and meet the second test. Given the number of signatures on the letters, the Court must conclude that the purpose of at least some of those signing was to restore workplace harmony and further the interests of the hospital's surgical services. However it is by no means clear that the purpose of those initiating the letters was to

workplace harmony and further the interests of the hospital's surgical services. However it is by no means clear that the purpose of those initiating the letters was to serve the master. The highly improper and unprofessional conduct of Ms. Story in interrupting a surgical procedure with a petition to be signed suggests otherwise.

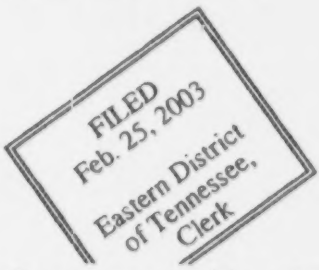
Accordingly, the Court will grant the plaintiff's motion for limited discovery with regard to the scope of employment issue and reserve a ruling on the government's motion to dismiss. [Doc. 5]. A separate order of judgment will follow.

ENTER:

/s/ THOMAS GRAY HULL
THOMAS GRAY HULL
SENIOR U.S. DISTRICT JUDGE

UNITED STATE DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

NANCY ROBERTS	)	
	)	
v.	)	**NO. 2:02-CV-381**
	)	
UNITED STATES OF AMERICA	)	



ORDER

This matter is before the Court to consider the appeal by both parties of the Magistrate Judge's Order [Doc. 30], granting in part and denying in part the plaintiff's motion to compel. [Doc. 25].

The plaintiff filed this suit originally in state court against five of her coworkers in their individual capacities. The U.S. Attorney certified pursuant to the Westfall Act that the defendants were acting within the scope of their employment when the acts complained of were allegedly committed. The United States then sought to dismiss the plaintiff's complaint for failure to exhaust her administrative remedies under the Federal Tort Claims Act. The Honorable Thomas G. Hull, Senior United States District Judge, to whom this case was previously assigned,

entered an order permitting the plaintiff to conduct discovery limited to the scope of employment issue, in order to prepare for responding to the government's motion to dismiss.

Following the deposition of two of the originally named defendants, Ibrahim and Story, plaintiff's counsel sought to depose the remaining three individual defendants, but was refused the opportunity to do so. The plaintiff sought to compel the deposition of the remaining three original defendants, and sought a ruling that defense counsel could not instruct the original defendants to not answer certain questions. Defense counsel had instructed witnesses to not answer questions regarding the plaintiffs EEO complaints, which complaints are a subject of another suit before this Court.

The Magistrate Judge ruled that the plaintiff could depose two of the remaining original defendants, Hagen and Weston, but not Dunn, the allegations against whom the Magistrate found to not be even arguably actionable. The Magistrate further ruled that counsel for the defendant, under these rare circumstances, could instruct a witness not to answer particular questions, and that the burden would be then upon the plaintiff to file a motion to compel, if the

plaintiff deemed such questions to be within the limited scope of discovery permitted by the Court.

As Judge Hull indicated, the question before this Court is whether the conduct of the originally named defendants was within the scope of their employment In fact, Judge Hull very succinctly set forth that, of particular concern to the Court, among the elements to be considered in determining if an activity is within the scope of employment, was whether the purpose of the letters circulated by the original defendants was to serve the master.

Of course, the plaintiff wants to paint this element with a broad stroke, indicating that she must delve into the motivation behind letters circulated by the original defendants which are at the core of the defendant's complaint. What the plaintiff ignores is that employees may engage in improper conduct, even that which amounts to verbal harassment and intimidation, and that conduct still be within the scope of employment. *Arbour v. Jenkins*, 903 F.2d 416, 422 (6th Cir. 1990); *see Wolverton v. United States*, 1997 WL 85153, *2 (6th Cir. (Tenn.) 1997) (involving claims of defamation and intentional infliction of emotional distress).

The Court's determination of whether the acts complained of were to serve the master cannot revolve around the subjective intent of the employees. *RMJ Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996). Clearly, an employee's acts can both serve the master, and also serve an employee's personal vendetta against another employee. Thus, that an employee's acts were malicious does not necessarily mean that those acts are outside the scope of employment. "[W]hether an employee was acting within the scope of his employment is a question of law, not fact, made in accordance with the law of the state where the conduct occurred." *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir.2002). Accordingly, the Magistrate Judge properly held that the plaintiff's attempts to delve into the subjective intent of the original defendants was outside the scope of this Court's limits placed on discovery.

> [W]e have held that although a district court may conduct an evidentiary hearing to determine whether certification is appropriate in a particular case, no hearing is needed "where even if the plaintiff's assertions were true, the complaint allegations establish that the employee was acting within the scope of his/her employment. *Id.* at 871.

As the Magistrate Judge found, even accepting the plaintiff's allegations as true, the defendant Dr. Dunn was clearly acting within the scope of her employment. All that Dr. Dunn is alleged to have done is to have signed and circulated a memo, which was also signed by eleven other physicians at the Veterans Administration Medical Center. Thus, no further discovery is needed of Dr. Dunn.

As to the original defendants Hagen and Weston, pursuant to the allegations made against them in the plaintiffs complaint, and the documents submitted by the plaintiffs in reference to the motion to dismiss they stand on similar footing to that of Ibrahim and Story. Therefore, the plaintiff should be permitted to depose them on the limited issue of the scope of their employment.

Accordingly, after careful consideration of the Order of the United States Magistrate Judge, [Doc. 30], it is hereby **ORDERED** that this Order is **ADOPTED** and **APPROVED**, and that the parties' appeals of the Order are **DENIED**. [Docs. 31 and 32].

ENTER:

/s/ J. RONNIE GREER
UNITED STATES DISTRICT JUDGE